

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

200 East Randolph Drive
Chicago, Illinois 60601

312 861-2000

www.kirkland.com

Reed S. Osian, P.C.
To Call Writer Directly:
312 861-2166
rosian@kirkland.comFacsimile:
312 861-2200

US EPA RECORDS CENTER REGION 5



478096

July 7, 2005

Via Facsimile & U.S. MailJames N. Mayka
Chief, Remedial Response Branch II
Superfund Division
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590**Re: Himco Dump Site**

Dear Mr. Mayka:

We were surprised and disappointed to receive your June 27 letter. Not only does it contain numerous incorrect statements, it appears to cut off negotiations with the PRP Group toward a global settlement even though, at EPA's request and with its foreknowledge, the PRPs have been working diligently for the past two months to select a contractor and raise money to further negotiate a long overdue global resolution for the site. Despite having worked with EPA on this site since 1989, no one at EPA had the courtesy to call me and seek an update on the PRP Group's status before sending the letter. Had EPA done so, it would have learned that the PRP Group is quite close to selecting a contractor (the bidders have been reduced to two candidates) and will be in a position to negotiate a global resolution in the next few weeks.

You were apparently misinformed on numerous points before sending your letter. First, the PRP Group did not expressly refuse to pay any past costs. In fact, while our initial letter indicated the Group did not feel it appropriate to pay past costs, when called to a meeting for the express purpose of discussing past costs, the Group put \$1 million on the table and indicated that more could be put on the table after obtaining quotes from cleanup contractors. We now have those quotes and are moving forward. While the Group expressed a preference that the \$1 million be used for redevelopment of the site (as opposed to reimbursement of past costs to EPA), we left that decision to the agency.

Second, the statement "previous refusals by Bayer and others to do the required work at the Site are the reason for much of the past expenditures. . . ." is incorrect. EPA's own questionable conduct at this site has caused the enormous waste of funds at Himco and has contributed to delays in moving the site forward. A bit of history is required:

London

Los Angeles

Munich

New York

San Francisco

Washington, D.C.

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After failing during the Remedial Investigation to locate any meaningful contamination at the site, in 1991 EPA issued a proposed plan for a \$20-plus million remedy (including an extensive RCRA cap). EPA justified this remedy based upon a flawed risk assessment and a flawed interpretation of that risk assessment. Among other factors, the flawed risk assessment assumed many substances to be present although they were not detected in any groundwater sample. Institutional controls prohibiting installation of ground water wells into the landfill mass, other than for purposes of monitoring, would have been sufficient to mitigate the unreasonable and highly unlikely exposure scenario envisioned in the risk assessment, which was consumption of landfill leachate by hypothetical, on-site residents. Bayer and other PRPs issued detailed comments (prepared at significant cost) demonstrating that the site did not warrant any remedy, let alone such an extreme remedy as was proposed. Indeed, EPA has selected "no further action" at other Superfund sites on the basis of similar risk assessment results. While considering these comments and its options, EPA forged ahead and spent over \$1.5 million on a remedial design of that invalid remedy.

In the middle 1990s, EPA realized it could not support its initial remedy based on the flawed risk assessment and entered into discussion to amend the ROD to include only maintenance-related items. In short, it abandoned its prior remedy -- and, thus, the \$1.5 million remedial design costs, which never should have been expended, were rendered worthless by EPA. Searching for a new direction, EPA then decided to conduct additional off site sampling to the east of the site (all homes to the south were placed on City water by Bayer and the City years ago). As it looked for a problem it has been unable to find for over a decade, EPA observed a very few hits of chlorinated substances in groundwater to the east. While the source of these few hits was never found, EPA assumed that such substances emanated from the site. It does not have any evidence to confirm this.

On several occasions, Bayer offered to perform work at the Himco site to address the perceived concerns there. These offers included providing funding to EPA to use at its discretion, installation of fencing, city water hook ups, and other site-related work. EPA repeatedly refused -- in one instance simply ignored -- Bayer's offers.

Recently then, EPA issued an amended ROD in which it required only a soil cover of the site, municipal water hookups for a few homes, a passive gas trench, and groundwater monitoring. In contrast to the 1991 ROD remedy -- which suggested a significant environmental problem at the site -- the new remedy demonstrates that Himco should not have been listed as a Superfund site. Every contractor that has looked at Himco has indicated their disbelief that this site is found on the NPL.

Notwithstanding the questionable history at the site, the PRP Group has indicated to EPA that it is prepared to implement the remedy (even though the PRP Group believes the remedy cannot be defended by EPA as being required action under CERCLA). The PRP Group

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also has indicated that it will pay at least \$1 million toward past costs -- although it has also made it clear that EPA's conduct and the existence of numerous orphans and recalcitrants (including the former site operator for which the site is named) means that the group cannot pay anywhere near the \$5.8 million spent.

So, we confirm to EPA again, we are prepared to negotiate a global settlement. The choice is EPA's of course, but we believe a fair review of the circumstances and the impending selection of a contractor to perform the work should prompt EPA to return to the bargaining table with an accommodating stance. This is not a site EPA should rush to litigate -- its the poster child for what is wrong with Superfund. Separately, press reports have confirmed the mayor of Elkhart recently advised his colleagues in Washington that the Himco site is a black eye on Elkhart and a cloud over the City. Its time to finally resolve this site and Bayer is prepared to participate.

We await your scheduling of a meeting on moving forward. We will make the appropriate PRP representatives available as necessary. In the future, we would hope to have an open dialogue with EPA and avoid misinformed decision-making that has made this site an embarrassment to all involved.

Sincerely


Reed S. Oslan, P.C.

RSO/md

cc: Jerome I. Maynard
W.C. Blanton
Richard W. Paulen
Larry Johnson